



DEPARTMENT OF HOMELAND SECURITY

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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1240

EOIR No. 23-0010; AG Order No. 5632-2023

RIN 1125-AB29

Implementation of the 2022 Additional Protocol to the 2002 U.S.-Canada Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: This rule amends existing Department of Homeland Security (“DHS”) and Department of Justice (“DOJ”) (collectively, “the Departments”) regulations to implement the Additional Protocol to the Agreement between The Government of the United States of America and The Government of Canada For Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries (“Additional Protocol of 2022”) negotiated by the Governments of the United States and Canada and signed in Ottawa, Ontario, Canada, on March 29, 2022, and in Washington, DC, United States, on April 15, 2022, respectively. The Additional Protocol of 2022 supplements certain terms of the December 5, 2002, Agreement between The Government of the United States and The Government of Canada For Cooperation in the Examination of

Refugee Status Claims from Nationals of Third Countries (“Safe Third Country Agreement,” “STCA,” or “Agreement”). Pursuant to the STCA, the respective governments manage which government decides certain individuals’ requests for asylum or other protection relating to fear of persecution or torture (referred to as a “refugee status claim” in the STCA and the Additional Protocol of 2022) pursuant to its laws, regulations, and policies implementing its international treaty obligations relating to non-refoulement. Under the STCA, only those individuals who cross the U.S.-Canada land border at a port of entry (“POE”), or in transit while being removed or deported to a third country from the “country of last presence,” are subject to the terms of the STCA. Once the Additional Protocol of 2022 is implemented, the STCA also will apply to individuals who cross the U.S.-Canada land border between POEs, including certain bodies of water, and who make an asylum or other protection claim relating to a fear of persecution or torture within 14 days after such crossing. The Additional Protocol of 2022 will enter into force once the United States and Canada have officially notified each other that they have completed the necessary domestic procedures for bringing the Additional Protocol of 2022 into force. The Departments intend this official notification to coincide with the effective date of this final rule at 12:01 a.m. on Saturday, March 25, 2023.

DATES: This final rule is effective at 12:01 a.m. on Saturday, March 25, 2023.

FOR FURTHER INFORMATION CONTACT: For U.S. Citizenship and Immigration Services: Rená Cutlip-Mason, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588-0009; telephone (240) 721-3000 (not a toll-free call).

For Executive Office of Immigration Review: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, Department of

Justice, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041; telephone (703) 305-0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

- A. Purpose of the Regulatory Action*
- B. Summary of Legal Authority*
- C. Summary of the Final Rule Provisions*

II. Background

- A. DOJ and DHS Legal Authority*
- B. Overview of the Safe Third Country Agreement in the Context of Asylum, Expedited Removal Proceedings, and Removal Proceedings*
 - 1. Asylum
 - 2. Expedited Removal Proceedings and Removal Proceedings
 - 3. Safe Third Country Agreement
- C. Updates to the Safe Third Country Agreement through the Additional Protocol of 2022*

III. Discussion of Final Rule

- A. General Discussion of Changes*
- B. Determinations Regarding Crossing Between POEs and Whether 14 Days Have Elapsed*
- C. Considerations Relating to the Preponderance-of-the-Evidence Standard*
- D. Return to the Country of Last Presence*

IV. Detailed Summary of Regulatory Changes

- A. New 8 CFR 208.30(e)(6) and (7)*
- B. New 8 CFR 1003.42(h)(1) and (2) and 8 CFR 1240.11(g)(heading), (g)(1) through (4), (h)(1)*

V. Statutory and Regulatory Requirements

- A. Administrative Procedure Act*
- B. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)*
- C. Regulatory Flexibility Act*
- D. Unfunded Mandates Reform Act of 1995*
- E. Congressional Review Act*
- F. Executive Order 13132 (Federalism)*
- G. Executive Order 12988 (Civil Justice Reform)*

H. Family Assessment

I. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

J. National Environmental Policy Act

K. Paperwork Reduction Act

I. Executive Summary

A. Purpose of the Regulatory Action

The Departments are amending their respective regulations to implement the Additional Protocol of 2022 to the STCA.¹ Under the STCA and its existing implementing regulations, third country nationals seeking asylum or other protection from persecution or torture must make a claim in the first country they arrive in (United States or Canada), unless they qualify for an exception to the STCA.² Therefore, asylum seekers³ arriving from Canada at a land border POE⁴ in the United States, or in transit through the United States during removal by Canada, are generally barred from pursuing their asylum or other protection claim relating to fear of persecution or torture⁵ in the United States unless they meet an exception under the STCA. Those who do not meet an exception under the STCA may be returned to Canada to pursue their claim. Similarly, third country nationals arriving from the United States at a Canadian land border POE, or

¹ See Agreement between The Government of The United States of America and The Government of Canada For Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229, <https://www.state.gov/04-1229>.

² See STCA art. 4; see also 8 CFR 208.30(e)(6), 1003.42(h), 1240.11(g).

³ The Departments use the term “asylum seeker” to be synonymous with the term “Refugee Status Claimant” used in the STCA and Additional Protocol of 2022, which is defined as “any person who makes a refugee status claim in the territory of one of the Parties.” STCA art. 1(d).

⁴ See 19 CFR 101.1 (defining “port” and “port of entry”) and 8 CFR 100.4 (list of POEs).

⁵ The Departments use the term “asylum or other protection claim relating to persecution or torture” to be synonymous with the phrase “Refugee Status Claim” used in the STCA and Additional Protocol of 2022, which means “a request from a person to the government of either Party for protection consistent with the Convention or the Protocol, the Torture Convention, or other protection grounds in accordance with the respective laws of each Party.” STCA art. 1(c). The Convention, Protocol, and Torture Convention referenced in the definition are the Convention Relating to the Status of Refugees, done at Geneva, July 28, 1951; the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, December 10, 1984.

in transit through Canada during removal by the United States, who are seeking asylum or other protection relating to fear of persecution or torture in Canada may be returned to the United States under the STCA to pursue their asylum or other protection claim relating to fear of persecution or torture under United States immigration law, unless they qualify for an exception under the STCA.

The Additional Protocol of 2022 supplements the STCA.⁶ The United and Canada have agreed to the Additional Protocol of 2022, but amendments to the existing regulations of the United States are necessary to extend the STCA's application under the Additional Protocol of 2022 to individuals who cross between the official POEs along the U.S.-Canada shared border, including certain bodies of water as determined by the United States and Canada, and make an asylum or other protection claim relating to fear of persecution or torture within 14 days after such crossing.

B. Summary of Legal Authority

The authority for the Attorney General and the Secretary of Homeland Security ("Secretary") to issue this final rule is found in section 208(a)(2)(A) of the Immigration and Nationality Act ("INA" or "the Act"), 8 U.S.C. 1158(a)(2)(A), which governs an individual's eligibility to apply for asylum if the Attorney General or the Secretary determines that the noncitizen may be removed, pursuant to a bilateral or multilateral agreement, to a safe third country. Under sections 103(a)(1) and (3) of the INA, 8 U.S.C. 1103(a)(1), (3), the Secretary is authorized to establish such regulations as the Secretary deems necessary for carrying out the Secretary's authority under the INA. Under section 103(g) of the INA, 8 U.S.C. 1103(g), the Attorney General is authorized to establish such regulations as the Attorney General deems necessary in immigration proceedings.

⁶ See Additional Protocol of 2022 art. 1. Correspondingly, the provisions of the STCA apply to the Additional Protocol of 2022 except as otherwise specified in the Additional Protocol of 2022. See *id.*

C. Summary of the Final Rule Provisions

This rule does not alter the procedures applied to expedited removal proceedings, credible fear screenings, or threshold screening interviews as provided in the current regulations. The STCA is implemented within the existing framework that authorizes the removal of noncitizens⁷ from the United States, including expedited removal proceedings under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), and ordinary removal proceedings before an immigration judge under section 240 of the INA, 8 U.S.C. 1229a.

This final rule amends 8 CFR 208.30(e)(6) of the DHS regulations to authorize an asylum officer to conduct a threshold screening interview. This interview will determine whether a noncitizen is ineligible to apply for asylum by claiming a fear of persecution or torture (pursuant to section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A)), when such a claim is made within 14 days after crossing the U.S.-Canada land border between POEs, including crossing the border in bodies of water mutually designated by the United States and Canada. This final rule revises 8 CFR 208.30(e)(6)(i) to clarify that persons who are subject to the Additional Protocol of 2022 and who do not qualify for an exception under the STCA are ineligible to apply for asylum in the United States. This rule also revises 8 CFR 208.30(e)(6)(ii) by adding a reference to the Additional Protocol of 2022 to clarify that a noncitizen must establish, by a preponderance of the evidence, that an exception applies before an asylum officer may proceed with the credible fear determination. This rule also amends 8 CFR 208.30(e)(6)(iii) by clarifying that the STCA includes the Additional Protocol of 2022. This rule also revises 8 CFR 208.30(e)(7) by adding a reference to the Additional Protocol of 2022 to clarify that the

⁷ For purposes of the discussion in this preamble, the Departments use the term “noncitizen” to be synonymous with the term “alien” as it is used in the INA. *See* INA 101(a)(3), 8 U.S.C. 1101(a)(3); *Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (“This opinion uses the term ‘noncitizen’ as equivalent to the statutory term ‘alien.’ *See* 8 U.S.C. § 1101(a)(3).”). Throughout this preamble the Departments also use the terms “individual” or “person.”

procedures outlined in 8 CFR 208.30(e)(7) apply to noncitizens who are subject to an agreement under section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), other than the U.S.-Canada STCA, which includes the Additional Protocol of 2022.

Further, this rule revises 8 CFR 1003.42(h)(1) of the regulations of the Department of Justice's Executive Office for Immigration Review ("EOIR"), which establishes that an asylum officer's determination relating to the application of the STCA is not subject to an immigration judge's review. This final rule clarifies that this provision also extends to determinations made pursuant to the Additional Protocol of 2022. This rule also revises 8 CFR 1003.42(h)(2) to clarify that the existing provisions, which establish that any determination by DHS that a noncitizen being removed from Canada in transit through the United States should be returned to Canada to pursue asylum claims under Canadian law is not subject to an immigration judge's review, also extend to a determination made pursuant to the Additional Protocol of 2022.

Next, because the STCA, as supplemented by the Additional Protocol of 2022, also applies to individuals in removal proceedings, this final rule makes corresponding amendments to 8 CFR 1240.11(g) (heading) and (g)(1) through (4) of the EOIR regulations to require an immigration judge to consider the Additional Protocol of 2022 to the STCA in determining whether a noncitizen should be returned to Canada for adjudication of their protection claim or whether the noncitizen should be permitted to apply for asylum or seek other protection relating to fear of persecution or torture in the United States. Last, this rule revises 8 CFR 1240.11(h)(1) by adding a reference to the Additional Protocol of 2022 to clarify that the procedures outlined in 8 CFR 1240.11(h)(1) apply to noncitizens who are subject to agreements under section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), other than the U.S.-Canada STCA, which includes the Additional Protocol of 2022.

II. Background

A. DOJ and DHS Legal Authority

The Attorney General and the Secretary publish this joint rule pursuant to their respective authorities concerning asylum, withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3) (“statutory withholding of removal”), and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment⁸ (“Convention Against Torture” or “CAT”) determinations. The Homeland Security Act of 2002 (“HSA”), Public Law 107-296, 116 Stat. 2135, as amended, created DHS and transferred to it many functions related to the administration and enforcement of Federal immigration law.

The INA, as amended by the HSA, charges the Secretary “with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of [noncitizens],” and it grants the Secretary the power to take all actions “necessary for carrying out” his authority under the immigration laws. *See* INA 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3); *see also* 6 U.S.C. 112, 202. The Secretary’s authority also includes the authority to publish regulations governing the apprehension, inspection and admission, detention, removal, withholding of removal, and release of noncitizens encountered in the interior of the United States or at or between the U.S. POEs. *See* INA 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

In addition, under the HSA, the Attorney General retained authority over conduct of removal proceedings pursuant to section 240 of the INA, 8 U.S.C. 1229a (“section 240 removal proceedings”). EOIR’s immigration judges conduct these adjudications. *See* INA 103(g), 8 U.S.C. 1103(g), 6 U.S.C. 521; *see also* 8 CFR 1001.1(l). This immigration judge authority includes adjudication of certain asylum applications, as well as requests for statutory withholding of removal and protection under the CAT.

⁸ Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

Additionally, the INA provides that “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” INA 103(a)(1), 8 U.S.C. 1103(a)(1).

The INA authorizes the Attorney General and Secretary to set “requirements and procedures” for implementing the asylum provisions in section 208(b)(1)(A) of the INA, 8 U.S.C. 1158(b)(1)(A), and to establish by regulation, consistent with section 208 of the INA, 8 U.S.C. 1158, “other conditions or limitations on the consideration of an application for asylum,” INA 208(d)(5)(B), 8 U.S.C. 1158 (d)(5)(B).

The HSA grants to DHS concurrent authority to adjudicate affirmative asylum applications—i.e., applications for asylum filed with DHS for individuals not in removal proceedings—and authority to conduct credible fear interviews, make credible fear determinations in the context of expedited removal, and establish procedures for further consideration of asylum applications after an individual is found to have a credible fear. *See* 6 U.S.C. 271(b)(3); INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). By operation of the HSA, the references to the “Attorney General” in the INA are understood also to encompass the Secretary, either solely or additionally, with respect to statutory authorities vested in the Secretary in the HSA or subsequent legislation, including in relation to immigration proceedings before DHS. *See* 6 U.S.C. 557. Some of those authorities have been delegated within DHS to the Director of U.S. Citizenship and Immigration Services (“USCIS”), and USCIS asylum officers conduct threshold screening interviews, conduct credible fear interviews, make credible fear determinations, and determine whether a noncitizen’s asylum application should be granted.⁹ *See* 8 CFR 208.2(a), 208.9, 208.30.

⁹ *See* DHS, Delegation to the Bureau of Citizenship and Immigration Services, No. 0150.1 (June 5, 2003), <https://www.hsdl.org/?abstract&did=234775>.

With limited exceptions, immigration judges within DOJ adjudicate asylum, statutory withholding of removal, and CAT protection applications filed by noncitizens during the pendency of section 240 removal proceedings, and immigration judges adjudicate applications of asylum-seekers in cases USCIS refers to the immigration court. 8 CFR 1208.2(b), 1240.1(a); *see* INA 101(b)(4), 240(a)(1), 241(b)(3), 8 U.S.C. 1101(b)(4), 1229a(a)(1), 1231(b)(3).

The United States is a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 (“Refugee Protocol”), which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (“Refugee Convention”). Article 33 of the Refugee Convention generally provides that parties to the Convention cannot expel or return (“refouler”) “a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion.” *See* 19 U.S.T. at 6276. The United States implements its non-refoulement obligations under Article 33 of the Refugee Convention (via the 1967 Protocol) through the statutory withholding of removal provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), which provides that noncitizens may not be removed to a country where their life or freedom would be threatened on account of one of the protected grounds listed in Article 33 of the Refugee Convention. *See* 8 CFR 208.16, 1208.16; Regulations Concerning the Convention Against Torture, 64 FR 8478, 8478 (Feb. 19, 1999) (effective Mar. 22, 1999), as corrected by 64 FR 13881 (Mar. 23, 1999).

Similarly, “[u]nder Article 3 [of the CAT], the United States has agreed not to ‘expel, return (“refouler”) or extradite’ a person to another state where [they] would be tortured.” 64 FR at 8478. Regulations to implement the United States’ obligations under

Article 3 of the CAT are located primarily at 8 CFR 208.16(c) through 208.18 (DHS regulations) and 1208.16(c) through 1208.18 (EOIR regulations).¹⁰

B. Overview of the Safe Third Country Agreement in the Context of Asylum, Expedited Removal Proceedings, and Removal Proceedings

1. Asylum

Asylum is a discretionary benefit that can be granted by the Attorney General or the Secretary if a noncitizen establishes, among other things, that they have experienced past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INA 101(a)(42), 208, 240(c)(4)(A), 8 U.S.C. 1101(a)(42), 1158, 1229a(c)(4)(A); 8 CFR 208.13, 1208.13. Under section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), any person who arrives or is physically present in the United States is generally permitted to apply for asylum. For an asylum officer or immigration judge to grant asylum, however, they must determine that no bars to applying for asylum¹¹ under section 208(a)(2) of the INA, 8 U.S.C. 1158(a)(2), nor any bars to eligibility for asylum under section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A), apply to an individual's case.¹² One of these bars provides that a noncitizen does not have the right to apply for asylum in the United States if the Attorney General or the Secretary¹³ determines that the noncitizen “may be removed, pursuant to a bilateral or multilateral agreement, to a country where the

¹⁰ *See* 64 FR at 8478.

¹¹ The bars to applying for asylum include removal to a safe third country (INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A)), the one-year filing deadline for filing an application for asylum (INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B)), and previous denials of asylum (INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C)).

¹² The bars to eligibility for asylum include persecution of others on account of one of the protected grounds, conviction of a particularly serious crime, serious reasons for believing the noncitizen committed a serious nonpolitical crime outside the United States prior to arrival in the United States, certain support for or participation in terrorist activities, reasons for regarding the noncitizen as a danger to the security of the United States, and firm resettlement. *See* INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A).

¹³ As noted previously noted in Part II.A of this preamble, references to the Attorney General in the INA, in general, are to be read as referring to the Secretary of Homeland Security, either solely or in addition to the Attorney General, by operation of the HSA. *See* 6 U.S.C. 557.

[noncitizen]’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the [noncitizen] would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection[.]” INA 208(a)(2)(A), 8 U.S.C.

1158(a)(2)(A). The statute also preserves the Departments’ discretion not to apply the bar in section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), in a given case if DHS “finds that it is in the public interest for the [noncitizen] to receive asylum in the United States.” *Id.* The INA further provides that “[n]o court shall have jurisdiction” to review any determination made under any of the provisions within section 208(a)(2) of the Act, 8 U.S.C. 1158(a)(2), including the safe third country provision at INA section 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). *See* INA 208(a)(3), 8 U.S.C. 1158(a)(3).

2. Expedited Removal Proceedings and Removal Proceedings

The STCA is implemented within the framework of existing proceedings that authorize the removal of noncitizens from the United States, including expedited removal proceedings under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), and removal proceedings before an immigration judge under section 240 of the INA, 8 U.S.C. 1229a.

An applicant for admission must be inspected by an immigration officer¹⁴ to determine whether the individual is admissible to the United States. *See* INA 235(a), (b), 8 U.S.C. 1225(a), (b). If a noncitizen cannot “clearly and beyond a doubt” establish that they are entitled to be admitted, then an immigration officer will determine, as a matter of discretion, whether the individual will be placed in expedited removal proceedings,

¹⁴ *See* 8 CFR 1.2 (defining “immigration officer”).

where applicable, under section 235 of the INA, 8 U.S.C. 1225, or in removal proceedings under section 240 of the INA, 8 U.S.C. 1229a.¹⁵

Under expedited removal proceedings, individuals arriving in the United States, also referred to as “arriving aliens”¹⁶ or “certain other [noncitizens]” as designated by the Secretary who are found to be inadmissible under either section 212(a)(6)(C) of the INA, 8 U.S.C. 1182(a)(6)(C), for misrepresentation, or section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), for failure to meet documentation requirements for admission, may be “removed from the United States without further hearing or review unless the [noncitizen] indicates either an intention to apply for asylum under [section 208 of the INA, 8 U.S.C. 1158] or a fear of persecution.” INA 235(b)(1)(A)(i), (iii), 8 U.S.C. 1225(b)(1)(A)(i), (iii); 8 CFR 235.3(b). In addition to the foregoing classes of noncitizens subject to expedited removal, the Secretary has designated other noncitizens subject to expedited removal, including noncitizens who are present in the United States without having been inspected at a POE, who are encountered by an immigration officer within 100 air miles of a U.S. land border, “who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter,” and who otherwise meet certain criteria for expedited removal.¹⁷

Generally, if a noncitizen is placed into expedited removal proceedings, and the noncitizen indicates an intention to apply for asylum or expresses a fear of persecution or

¹⁵ See INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A) (“Subject to subparagraphs (B) and (C), in the case of a [noncitizen] who is an applicant for admission, if the examining immigration officer determines that a [noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] shall be detained for a proceeding under [section 240.]”); *see also* INA 235(b)(2)(B), 8 U.S.C. 1225(b)(2)(B) (providing that crewmen, stowaways, and noncitizens subject to expedited removal are not entitled to section 240 removal proceedings).

¹⁶ “Arriving alien” is defined in regulations as meaning, in general, an “applicant for admission coming or attempting to come into the United States at a port-of-entry,” and the term includes noncitizens who are interdicted at sea and brought into the United States. 8 CFR 1.2, 1001.1(q).

¹⁷ See Designating Aliens For Expedited Removal, 69 FR 48877, 48877 (Aug. 11, 2004).

torture or a fear of return to their country,¹⁸ the examining immigration officer will refer the noncitizen for an interview with an asylum officer. The purpose of the interview with an asylum officer is to screen for potential eligibility for asylum and other related protection claims relating to fear of persecution or torture. *See* 8 CFR 208.30(e)(2) and (3). Under the STCA, however, for noncitizens arriving from Canada at a land border POE, the asylum officer will conduct a threshold screening, prior to any credible fear screening, to determine whether a noncitizen is subject to the STCA and barred from applying for asylum or seeking other protection relating to fear of persecution or torture. *See* 8 CFR 208.30(e)(6), 8 CFR 1240.11(g)(4). An immigration judge does not have jurisdiction to review an asylum officer's determination that the STCA applies. *See* 8 CFR 1003.42(h)(1) and (2). Under 8 CFR 208.30(e)(7) or 8 CFR 1240.11(h), if a noncitizen is subject to an agreement other than the U.S.-Canada STCA, the procedures outlined in 8 CFR 208.30(e)(7) or 1240.11(h) apply. *See* 8 CFR 208.30(e)(7), 1240.11(h).

If DHS does not make an STCA determination and refers the noncitizen to an immigration judge for section 240 removal proceedings, the immigration judge determines whether the noncitizen is eligible to apply for asylum or other protection claims relating to fear of persecution or torture, including whether the STCA applies to render the noncitizen ineligible to apply for asylum under section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), and subject to removal to Canada under the terms of the STCA. *See* INA 235(b)(1)(A)(i), (b)(2)(A), 8 U.S.C. 1225(b)(1)(A)(i), (b)(2)(A); 8 CFR 235.1(f)(2), 1240.11(g).

¹⁸ *See* 8 CFR 235.3(b)(4).

3. Safe Third Country Agreement

On December 5, 2002, the Governments of Canada and the United States signed the STCA to effectively manage the flow of asylum and other protection claimants between the two countries. The STCA allocates responsibility between the United States and Canada whereby one country or the other (but not both) assumes responsibility for processing the claims of certain third country national¹⁹ asylum seekers who are traveling from Canada into the United States or from the United States into Canada. The STCA provides for a threshold determination concerning which country will consider the merits of a noncitizen's asylum and other protection claims relating to persecution or torture. This process enhances the two nations' ability to manage, in an orderly fashion, asylum and other protection claims brought by persons crossing the U.S.-Canada common border.²⁰

Consistent with section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), the STCA provides for the return of certain asylum seekers to the "country of last presence," the country in which the noncitizen was physically present immediately prior to making the asylum or protection claim,²¹ following the crossing of the land border at a POE,²² or in transit from the country of last presence during the course of deportation or removal. Accordingly, under the STCA, noncitizens arriving in the United States from Canada at a

¹⁹ The STCA does not apply to those seeking asylum or other protection relating to fear of persecution or torture who are citizens of Canada or the United States or who, not having a country of nationality, are habitual residents of Canada or the United States. *See* STCA art. 2.

²⁰ *See* Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports of Entry, 69 FR 69480, 69488 (Nov. 29, 2004) ("DHS Final Rule").

²¹ *See* STCA art. 1(a) (defining "Country of Last Presence").

²² *See* 19 CFR 101.1 (defining POE); *see also* 8 CFR 100.4 (list of POEs).

POE, or in transit, must seek asylum or protection in Canada, unless they meet an exception under the STCA.²³

The Attorney General and the Secretary promulgated final rules implementing the STCA, adding, among other provisions, 8 CFR 208.30(e) (DHS regulations) and 8 CFR 1003.42(h) and 1240.11(g) (EOIR regulations) on November 29, 2004.²⁴

The DHS regulations implementing the STCA under 8 CFR 208.30(e)(6) provide a mechanism within the expedited removal process for determining whether the STCA or its exceptions apply.²⁵ Prior to making a determination whether a noncitizen who is arriving in the United States (at a U.S.-Canada land border POE or in transit through the United States during removal by Canada) and placed into expedited removal proceedings has a credible fear of persecution or torture, the asylum officer conducts the threshold screening interview to determine whether the noncitizen is ineligible to apply for asylum or other protection relating to persecution or torture and subject to removal to Canada.²⁶ In doing so, the asylum officer follows the same non-adversarial interview procedures as generally used in the expedited removal credible fear context.²⁷ Additionally, the asylum officer advises the noncitizen of the STCA's exceptions and questions the noncitizen as to whether any of the exceptions apply to the noncitizen's case.²⁸ If the asylum officer,

²³ Under Article 6 of the STCA, either country retains discretion to examine a protection claim where it determines that it is the public interest to do so, notwithstanding the provisions of the STCA.

²⁴ See DHS Final Rule, 69 FR at 69480; Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry, 69 FR 69490 (Nov. 29, 2004) ("DOJ Final Rule"). The final rules were issued after the Departments both had published proposed rules. See Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit at Land Border Ports-of-Entry, 69 FR 10620 (Mar. 8, 2004); Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry, 69 FR 10627 (Mar. 8, 2004).

²⁵ The exceptions under the STCA can be found in 8 CFR 208.30(e)(6)(iii) and (iv).

²⁶ See 8 CFR 208.30(e)(6).

²⁷ See 8 *id.* ("In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph[.]").

²⁸ See 8 CFR 208.30(e)(6).

with concurrence from a supervisory asylum officer, determines that the STCA applies and that the noncitizen does not qualify for an exception under the STCA, the noncitizen is not eligible to apply for asylum or other protection relating to persecution or torture in the United States. The noncitizen is advised that the noncitizen will be removed to pursue their protection claim(s) in Canada. *See* 8 CFR 208.30(e)(6)(i).

If the noncitizen establishes by a preponderance of the evidence that the noncitizen qualifies for an exception under the terms of the STCA, the asylum officer will make a written notation of the basis for the STCA exception and conduct a credible fear interview to determine whether the noncitizen has a credible fear of persecution or torture.²⁹

For individuals arriving from Canada at a land border POE or in transit during removal by the Canadian government who are issued a Notice to Appear placing them directly in section 240 removal proceedings (instead of being processed through expedited removal proceedings³⁰), the immigration judge makes the STCA determination, as authorized by 8 CFR 1240.11(g) of the EOIR regulations. The immigration judge makes this determination during the course of section 240 removal proceedings and in accordance with the procedures set forth in 8 CFR 1240.1 *et seq.* If the immigration judge determines that the STCA applies and the noncitizen does not qualify for an exception to STCA, the noncitizen is ineligible to apply for asylum or other

²⁹ *See* 8 CFR 208.30(e)(6)(ii). When a noncitizen is determined to be not subject to the STCA or subject to an exception, the asylum officer conducts the credible fear screening to identify potential eligibility for asylum, statutory withholding of removal, and protection under the CAT. *See* 8 CFR 208.30 (describing this process). If the asylum officer determines that a noncitizen does have a credible fear of persecution or torture, DHS may either: (1) refer the noncitizen to an immigration judge by initiating section 240 removal proceedings where the noncitizen may apply for asylum or other protection, or (2) retain jurisdiction over the noncitizen's asylum claim for further consideration in an interview pursuant to 8 CFR 208.9(b). *See* 8 CFR 208.2(a)(1)(ii), 208.30(f), 1208.2(a)(1)(ii), 1235.6(a)(1)(i).

³⁰ DHS has discretion to place a noncitizen who is otherwise subject to expedited removal into section 240 removal proceedings before an immigration judge. *See Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 523 (BIA 2011).

protection.³¹ The noncitizen may apply for any other relief from removal for which the noncitizen may be eligible, but if the noncitizen is ordered removed, the noncitizen shall be ordered removed to Canada.³² The immigration judge may not review, consider, or decide any discretionary public interest exception because such determinations are reserved to DHS. However, if DHS files a written notice in the proceedings before the immigration judge that DHS has decided in the public interest to allow the noncitizen to pursue claims for asylum or other related protection in the United States, the noncitizen may apply for asylum and or other related protection.³³

Under 8 CFR 208.30(e)(6)(ii), or under 8 CFR 1240.11(g)(2) (if the noncitizen is in section 240 removal proceedings), noncitizens must establish by a preponderance of the evidence that they qualify for an exception under the terms of the STCA in order to establish eligibility to apply for asylum.

C. Updates to the Safe Third Country Agreement through the Additional Protocol of 2022

Canada and the United States negotiated the Additional Protocol of 2022 to allow both governments to extend the application of the STCA to individuals who cross the U.S.-Canada land border between POEs, including certain bodies of water, and who make an asylum or other protection claim relating to fear of persecution or torture within 14 days after such crossing.

On February 23, 2021, President Biden released a statement with Prime Minister Justin Trudeau of Canada: Roadmap for a Renewed U.S.-Canada Partnership.³⁴ The

³¹ See 8 CFR 1240.11(g)(4).

³² *Id.*

³³ See 8 CFR 1240.11(g)(3).

³⁴ See White House, Roadmap for a Renewed U.S.-Canada Partnership (Feb. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/23/roadmap-for-a-renewed-u-s-canada-partnership/> (“Roadmap”).

leaders declared a shared interest in revitalizing and expanding the two countries’ “historic alliance and steadfast friendship.”³⁵ The leaders expressed their common concern about the global migration crisis, commitment to providing haven to refugees and asylum seekers, and determination to work together to strengthen efforts in these areas, including refugee resettlement.³⁶

On November 18, 2021, the two leaders (also joined by President Andrés Manuel López Obrador of Mexico) issued a joint statement following the North American Leaders’ Summit (“NALS”), underscoring the need for bold regional cooperation due to “[t]he complex factors causing an extraordinary increase in irregular migration throughout the hemisphere.”³⁷ They also affirmed their commitment to adopt an ambitious and comprehensive approach to safe, orderly, and humane migration management, based on shared responsibility.³⁸

The Canadian Minister of Immigration, Refugees, and Citizenship and the Secretary finalized the Additional Protocol of 2022, signed in Ottawa, Ontario, Canada, on March 29, 2022, and in Washington, DC, United States, on April 15, 2022, respectively.

The Additional Protocol of 2022 does not change the existing provisions of the STCA or the processes associated with the determinations on whether the STCA applies. However, it extends the application of the STCA so that it applies not only to noncitizens

³⁵ *Id.*

³⁶ *Id.*

³⁷ See White House, Building Back Better Together: A Secure, Prosperous North America (Nov. 18, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/18/building-back-better-together-a-secure-prosperous-north-america/> (“Building Back Better Together”).

³⁸ *Id.*; see also White House, Fact Sheet: Key Deliverables for the 2023 North American Leaders’ Summit, (Jan. 10, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/10/fact-sheet-key-deliverables-for-the-2023-north-american-leaders-summit/> (“Fact Sheet”). Additionally, last year, Canada adopted the Los Angeles Declaration on Migration and Protection. See White House, Los Angeles Declaration on Migration and Protection (June 10, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/> (“Los Angeles Declaration”).

who are encountered at a POE or in transit, but now also to noncitizens who enter in areas located between POEs on the U.S.-Canada land border, including certain bodies of water as mutually determined by the Governments of the United States and Canada, and who make an asylum or other protection claim relating to fear of persecution or torture within 14 days after such crossing.³⁹ The Additional Protocol of 2022 also stipulates that the country of last presence will not be required to accept the return of an asylum seeker if it determines that the asylum seeker did not make a claim relating to fear of persecution or torture within 14 days after crossing the land border between the POEs.⁴⁰ To assist the country of last presence in making this determination, the Additional Protocol of 2022 provides that the receiving country shall provide the country of last presence any relevant information, including information regarding the apprehension or entry of the noncitizen, if available.⁴¹

The Additional Protocol of 2022 is expected to support orderly migration, ensure the integrity of the asylum process and processes related to other protection claims, encourage individuals to seek asylum in the country of last presence, and discourage dangerous and illegal crossings between POEs.

III. Discussion of Final Rule

A. General Discussion of Changes

With this final rule, the Departments are implementing the terms of the Additional Protocol of 2022 to the STCA and amending their respective regulations at 8 CFR

³⁹ See Additional Protocol of 2022 art. 1 (“Except to the extent specified herein, the provisions of the Agreement shall apply, *mutatis mutandis*, except Article 10 of the Agreement, to this Additional Protocol . . .”).

⁴⁰ Additional Protocol of 2022 art. 3(b).

⁴¹ See *id.* art. 3(c). The Additional Protocol of 2022 contains provisions that are not relevant to this rulemaking but that are related to the implementation of the Additional Protocol of 2022, such as provisions relating to the development of standard operating procedures (Article 4), Termination (Article 5), Suspension (Article 6), and Effective Date of the Additional Protocol of 2022 (Article 7).

208.30(e)(6) and (7),⁴² 8 CFR 1003.42(h)(1) and (2), and 8 CFR 1240.11(g) and (h)(1)⁴³ governing the threshold screening process and the eligibility of noncitizens to apply for asylum. Because the Additional Protocol of 2022 only expands the application of the STCA, but otherwise does not make any changes that would affect existing policies, procedures, and safeguards in and associated with the STCA determinations, the existing policies, procedures, and safeguards, as outlined in current regulations, also apply to the terms of the Additional Protocol of 2022.⁴⁴

Under the amended final regulations, the terms of the STCA as supplemented by the Additional Protocol of 2022 will also apply to those individuals who cross the U.S.-Canada land border between the POEs on or after 12:01 a.m. on Saturday, March 25, 2023, and make a claim for asylum or other protection claim relating to a fear of persecution or torture within 14 days after such crossing. *See* 8 CFR 208.30(e)(6) and (7) and (e)(6)(i) through (iii), 1003.42(h)(1) and (2), 1240.11(g)(1) through (4) (as revised by this rule). Correspondingly, the Departments are adding references to the Additional Protocol of 2022 to these provisions where necessary to incorporate the Additional Protocol of 2022 within the regulatory framework.

Moreover, under the STCA, as supplemented by the Additional Protocol of 2022 and this rule, other noncitizens who are not defined as “arriving aliens” but who are

⁴² DHS is making conforming amendments to 8 CFR 208.30(e)(7), which addresses the implementation procedures for agreements under section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), other than the STCA and the Additional Protocol of 2022. DHS is amending the paragraph by replacing the current reference to the STCA of “other than the U.S.-Canada Agreement effectuated in 2004” with an updated reference to read “other than the U.S.-Canada Agreement, which includes the Additional Protocol of 2022.” The amendments thus clarify that the procedures outlined in paragraph (e)(7) of 8 CFR 208.30 do not apply to those noncitizens who are subject to the U.S. Canada Agreement, which includes the Additional Protocol of 2022. *See* 8 CFR 208.30(e)(7) (revised).

⁴³ DOJ is making conforming amendments to 8 CFR 1240.11(h)(1), which addresses the implementation of procedures for bilateral or multilateral agreement other than the STCA and the Additional Protocol of 2022. DOJ is amending the paragraph by replacing the current reference to the STCA of “ – other than the 2002 U.S.-Canada Agreement – ” with an updated reference to read “—other than the 2002 U.S.-Canada Agreement, which includes the Additional Protocol of 2022—.” *See* 1240.11(h)(1) (revised).

⁴⁴ Additional Protocol of 2022 art. 1.

subject to expedited removal proceedings will be subject to the same threshold screening to determine whether such noncitizens are barred from applying for asylum in the United States under the STCA, as supplemented by the Additional Protocol of 2022. These other individuals, who are subject to expedited removal proceedings with DHS, include noncitizens encountered within 100 miles of the land border and within 14 days of crossing the U.S.-Canada border.⁴⁵ In this context, a noncitizen is not eligible to apply for asylum or other related protection in the United States when DHS determines, during the threshold screening interview, that the noncitizen may be removed to Canada because the STCA, as supplemented by the Additional Protocol of 2022, is applicable and none of the exceptions apply to the noncitizen. *See* INA 208(a)(2), 8 U.S.C. 1158(a)(2); 8 CFR 208.30(e)(6)(i) through (iii) (revised). However, if DHS determines that the noncitizen has established by a preponderance of the evidence that an exception to the STCA, as supplemented by the Additional Protocol of 2022, does apply, then the asylum officer will make a written notation of the inapplicability of the STCA, which includes the Additional Protocol of 2022, and immediately proceed with the credible fear determination. *See* 8 CFR 208.30(e)(6)(ii) (revised). As provided in the existing EOIR regulations, immigration judges do not have jurisdiction to review an asylum officer's STCA determination.⁴⁶ The new regulatory text will continue to provide that an immigration judge does not have jurisdiction to review an asylum officer's STCA determination under the STCA, as supplemented by the Additional Protocol of 2022. *See* 8 CFR 1003.42(h)(1) (revised) (for applicants for admission), 8 CFR 1003.42(h)(2) (revised) (for noncitizens in transit).

⁴⁵ *See* 69 FR at 48877.

⁴⁶ *See* 8 CFR 1003.42(h)(1) and (2).

DOJ is also amending the regulatory text of 8 CFR 1003.42(h)(1) by removing the term “arriving alien” and replacing it with “applicants for admission” to clarify that an asylum officer’s determinations regarding applicants for admissions are not subject to review by the immigration judge. *See* 8 CFR 1003.42(h)(1) (revised). However, where an asylum officer has made a negative credible fear finding, the new regulatory text continues to provide that an immigration judge will continue to have jurisdiction to review this finding. *See id.*

DOJ is further amending the EOIR regulations to add references to the Additional Protocol of 2022 throughout 8 CFR 1240.11(g) and (h)(1), where appropriate, and to reflect that if a noncitizen is placed into section 240 removal proceedings, the immigration judge will make the determination whether the STCA, as supplemented by the Additional Protocol of 2022, applies. *See* 8 CFR 1240.11(g)(1) and (g)(2)(i) (revised).

DOJ is also amending 8 CFR 1240.11(g)(2)(ii) and (g)(3) by adding references to the Additional Protocol of 2022 to clarify that individuals who are subject to the STCA, as supplemented by the Additional Protocol of 2022, may establish exceptions. *See* 8 CFR 1240.11(g)(2)(ii) and (g)(3) (revised). Furthermore, DOJ is amending 8 CFR 1240.11(g)(3) to clarify that an immigration judge does not have jurisdiction to review, consider, or decide any issues pertaining to any discretionary determination of whether the noncitizen should be permitted to pursue an asylum claim notwithstanding the STCA, as supplemented by the Additional Protocol of 2022, because, under current STCA procedures, discretionary public interest determinations are reserved to DHS. *See* 8 CFR 1240.11(g)(3) (revised).

As is the case under current STCA procedures, a noncitizen in section 240 removal proceedings otherwise ineligible to apply for asylum under the STCA, as supplemented by the Additional Protocol of 2022, may apply for asylum with an

immigration judge if DHS files a written notice in the proceedings before the immigration judge that DHS has decided in the public interest to allow the noncitizen to pursue claims for asylum or other related protection. *See* 8 CFR 1240.11(g)(3) (revised). In addition, DOJ is amending 8 CFR 1240.11(g)(4), which provides that a noncitizen who is found to be ineligible to apply for asylum because of a safe third country agreement,⁴⁷ such as the STCA, is also ineligible to apply for statutory withholding of removal⁴⁸ or protection under the CAT. *See* 8 CFR 1240.11(g)(4). Because the Additional Protocol of 2022 supplements the STCA without changing this procedure, those noncitizens subject to the STCA, as supplemented by the Additional Protocol of 2022, will continue to be ineligible for withholding of removal or protection under the CAT. *See* 8 CFR 1240.11(g)(4) (revised). However, the noncitizen may apply for any relief from removal for which the noncitizen may be otherwise eligible, as is currently the case before the Additional Protocol of 2022 becomes effective. *See* 8 CFR 1240.11(g)(4) (current); 8 CFR 1240.11(g)(4) (revised).

Finally, DHS is amending the last sentence of 8 CFR 1240.11(g)(4) by adding a reference to the Additional Protocol of 2022. Adding a reference to the Additional Protocol of 2022 does not change procedures that have been in place under the STCA. The provision continues to state that, where an immigration judge determines that a noncitizen in removal proceedings is subject to the STCA and no exceptions apply, the noncitizen will be ordered removed to Canada, where the noncitizen will be able to pursue their protection claim under the laws of Canada, but the provision now clarifies that the STCA includes the Additional Protocol of 2022. *See* 8 CFR 1240.11(g)(4) (revised).

⁴⁷ *See* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A).

⁴⁸ *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3).

B. Determinations Regarding Crossing Between POEs and Whether 14 Days Have Elapsed

The Additional Protocol of 2022 supplements the STCA to provide that the STCA not only applies to individuals encountered at a POE or in transit while being removed or deported to a third country, but also to individuals who have crossed the U.S.-Canada land border between POEs, including via mutually designated bodies of water along or across the U.S.-Canada land border, and who seek asylum or other protection relating to persecution or torture within 14 days after such crossing.⁴⁹ As explained throughout this preamble, the Departments have existing procedures in place in the expedited removal context and the section 240 removal proceedings context relating to individuals crossing the U.S. border at designated POEs, in transit, or between POEs, as well as for the assessment of a 14-day time frame. The STCA is embedded within this process. *See* Part II of this preamble. Hence, the determinations concerning applicability of the STCA, as supplemented by the Additional Protocol of 2022, including the location and time of a noncitizen's crossing, as well as the calculation of the 14 days, will be made within that existing framework.⁵⁰ Consistent with existing practice, the noncitizen may not challenge an asylum officer's determination regarding whether the STCA, as supplemented by the Additional Protocol of 2022, applies to the noncitizen. *See* 8 CFR 208.30(e)(6) (current); 8 CFR 208.30(e)(6) (revised); *see also* 8 CFR 1003.42(h); INA 208(a)(3), 8 U.S.C. 1158(a)(3).

C. Considerations Relating to the Preponderance-of-the-Evidence Standard

Under the STCA, a noncitizen must establish by a preponderance of the evidence that an exception to the STCA applies. *See* 8 CFR 208.30(e)(6)(ii) (DHS regulation),

⁴⁹ *See* Additional Protocol of 2022 arts. 1–2.

⁵⁰ *See* 69 FR at 48879.

1240.11(g)(2) (EOIR regulation). Because the implementation of the Additional Protocol of 2022 does not alter the procedural aspects of the administration of the STCA, a noncitizen—to establish eligibility to apply for asylum or other protection relating to a fear of persecution or torture—must continue to establish by a preponderance of the evidence that an exception to the STCA (now, as supplemented by the Additional Protocol of 2022), applies to the noncitizen. *See* 8 CFR 208.30(e)(6)(ii), 1240.11(g)(2)(i) (revised).

D. Return to the Country of Last Presence

The Additional Protocol of 2022 requires information-sharing steps that do not result in additional regulatory amendments. These steps will be included in the standard operating procedures of the United States and Canada related to information sharing and will help each country to address and resolve any differences regarding operational implementation.

Under the STCA as originally signed, neither the United States nor Canada is required to accept the return of an asylum seeker automatically; both countries review each case individually in making those decisions.⁵¹ Either country may choose to allow an asylum seeker who is encountered at a POE, or in transit, from the other country to pursue an asylum or other protection claim relating to fear of persecution or torture if circumstances warrant in accordance with its own laws and policies.⁵²

Similarly, under the terms of the Additional Protocol of 2022, the country of last presence is not required to accept the return of the asylum seeker if it determines that the noncitizen did not make a claim for asylum or other protection claim relating to fear of

⁵¹ *See* STCA art. 4(3); *see also* DHS Final Rule, 69 FR 69483–84; DOJ Final Rule, 69 FR 69493–94.

⁵² *See* STCA arts. 4, 6.

persecution or torture within 14 days after crossing the land border in between the POEs.⁵³

Under the Additional Protocol of 2022, the receiving country is responsible for providing the country of last presence sufficient information relevant to the determination of the noncitizen's crossing of the land border between the POEs and the noncitizen's claim, including a copy of the record of apprehension between the POEs, if available, to assist the country of last presence in making the necessary determinations.⁵⁴ Therefore, before a noncitizen can be returned to Canada, DHS will provide relevant information, including a copy of the record of apprehension if available, to the Canadian Government.⁵⁵

⁵³ See Additional Protocol of 2022 art. 3(b).

⁵⁴ See Additional Protocol of 2022 art. 3(c).

⁵⁵ These additional information sharing steps do not result in additional regulatory amendments. In accordance with Article 4 of the Additional Protocol of 2022—which refers to Article 8 of the STCA's mandate to establish standard operating procedures—these procedures shall also be included in standard operating procedures to assist with the implementation. See Additional Protocol of 2022 art. 4. In accordance with the second paragraph of Article 8 of the STCA, which provides that these standard operating procedures “shall include mechanisms for resolving differences respecting the interpretation and implementation of the terms of [the STCA],” the Departments will cooperate with their Canadian counterparts to address and resolve any differences in the same spirit in which the STCA has been implemented over the years and in which the Additional Protocol of 2022 was negotiated. As reflected in the STCA and the Additional Protocol of 2022 themselves, and as previously indicated by DHS, the resolution of these procedures is more appropriately addressed through operating procedures than through the promulgation of regulations. See DHS Final Rule, 69 FR 69486.

IV. Detailed Summary of Regulatory Changes

A. New 8 CFR 208.30(e)(6) and (7)

DHS is amending 8 CFR 208.30(e)(6) in the introductory text by adding references to the Additional Protocol of 2022. DHS is further amending the provision by adding that, prior to any determination concerning whether a noncitizen who, on or after 12:01 a.m. on Saturday, March 25, 2023, entered the United States by crossing the U.S.-Canada land border between POEs, including a crossing of the border in those waters as mutually designated by the United States and Canada, and who made an asylum or other protection claim relating to fear of persecution or torture within 14 days after such crossing, the asylum officer shall conduct a threshold screening interview to determine whether the noncitizen is ineligible to apply for asylum under section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), and subject to removal to Canada by operation of the STCA, which includes the Additional Protocol of 2022. DHS is further amending the third sentence of 8 CFR 208.30(e)(6) by adding a reference to the Additional Protocol of 2022 and rewording the provision, so that, under the amended provision, the asylum officer shall advise the noncitizen of the exceptions in the STCA, which includes the Additional Protocol of 2022, and question the noncitizen as to the applicability of any of these exceptions to the noncitizen's case.

DHS is amending 8 CFR 208.30(e)(6)(i) by adding references to the Additional Protocol of 2022 to clarify that, if the asylum officer, with concurrence from a supervisory asylum officer, determines from the threshold screening interview that the noncitizen is subject to the STCA, which includes the Additional Protocol of 2022, and that the noncitizen does not qualify for an exception under the STCA, which includes the Additional Protocol of 2022, then the noncitizen is ineligible to apply in the United States for asylum or other forms of protection relating to a fear of persecution or torture.

Next, DHS is amending 8 CFR 208.30(e)(6)(ii) by adding references to the Additional Protocol of 2022, where appropriate, to clarify that if a noncitizen establishes by a preponderance of the evidence that they qualify for an exception under the terms of the STCA, which includes the Additional Protocol of 2022, then the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to determine whether the noncitizen has a credible fear of persecution or torture under 8 CFR 208.30(d). DHS is amending 8 CFR 208.30(e)(6)(iii) by adding a reference to the Additional Protocol of 2022 to clarify that a noncitizen qualifies for an exception to the STCA, which includes the Additional Protocol of 2022, if the noncitizen is not being removed from Canada in transit through the United States and meets the requirements of the exceptions otherwise listed.

Last, DHS is amending 8 CFR 208.30(e)(7) to clarify that the STCA referenced in that paragraph includes the Additional Protocol of 2022. This amendment does not change the substance of that paragraph.

The amendments to 8 CFR 208.30(e)(6) and (7) are effective at 12:01 a.m. on Saturday, March 25, 2023. The Department of State (“DOS”) will publish the Additional Protocol of 2022 on its website,⁵⁶ once effective, and noncitizens should refer to the DOS webpage.

This rule does not otherwise alter the procedures applied to expedited removal proceedings, credible fear screenings, or threshold screening interviews as provided in the current regulations.

B. New 8 CFR 1003.42(h)(1) and (2) and 8 CFR 1240.11(g)(heading), (g)(1) through (4), and (h)(1)

⁵⁶ See DOS, Treaties and Other International Acts Series (TIAS), <https://www.state.gov/tias/> (last visited Mar. 16, 2023).

DOJ is revising 8 CFR 1003.42(h)(1) in the paragraph heading, and throughout the text of the paragraph, by replacing “arriving alien” with “applicant for admission” and adding references to the Additional Protocol of 2022 to clarify that an immigration judge has no jurisdiction to review an asylum officer’s determination that an applicant for admission is ineligible to apply for asylum pursuant to the STCA, which includes the Additional Protocol of 2022, formed under section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), and that the noncitizen should be returned to Canada to pursue the noncitizen’s claim for asylum or other protection under the laws of Canada. DOJ is further amending the third sentence of the same paragraph by adding references to the Additional Protocol of 2022 and replacing “arriving alien” with “applicant for admission” to clarify that, in any case where an asylum officer has found that an applicant for admission qualifies for an exception to the STCA, which includes the Additional Protocol of 2022, or that the STCA, which includes the Additional Protocol of 2022, does not apply, an immigration judge has jurisdiction to review a negative credible fear finding made thereafter by the asylum officer. DOJ, in addition, is amending 8 CFR 1003.42(h)(2) to add a reference to the Additional Protocol of 2022. This amendment does not affect the substance of that paragraph. Under the amended provision, an immigration judge has no jurisdiction to review any determination by DHS that an alien being removed from Canada in transit through the United States should be returned to Canada to pursue asylum claims under Canadian law, under the terms of the STCA, which includes the Additional Protocol of 2022.

Next, DOJ is amending 8 CFR 1240.11(g) (heading) and (g)(1) by adding references to the Additional Protocol of 2022, with the effect that the STCA, which includes the Additional Protocol of 2022, will apply to noncitizens who are placed in section 240 removal proceedings, provided that they, on or after 12:01 a.m. on Saturday, March 25, 2023, enter the United States by crossing the U.S.-Canada land border

between the POEs and claim a fear of persecution or torture within 14 days after such crossing. In appropriate cases, the immigration judge will determine whether, under that Agreement, which includes the Additional Protocol of 2022, the noncitizen should be returned to Canada, or whether the noncitizen should be permitted to pursue asylum or other protection claims in the United States.

DOJ is also amending 8 CFR 1240.11(g)(2)(i) and (ii) by adding references to the Additional Protocol of 2022, where appropriate, and to clarify that a noncitizen is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), unless the immigration judge determines by a preponderance of the evidence that (1) the STCA, which includes the Additional Protocol of 2022, does not apply to the noncitizen or does not preclude the noncitizen from applying for asylum or other forms of protection in the United States; or (2) the noncitizen qualifies for an exception to the STCA, which includes the Additional Protocol of 2022, as set forth in 8 CFR 1240.11(g)(3).

DOJ is also amending 8 CFR 1240.11(g)(3) by adding references to the Additional Protocol of 2022, where appropriate, to clarify that the immigration judge shall apply the relevant regulations in deciding whether the noncitizen qualifies for any exception that would permit the United States to exercise authority over the noncitizen's asylum claim. The amendments further clarify that related exceptions are codified at 8 CFR 208.30(e)(6)(iii). The regulation continues to provide that the immigration judge shall not review, consider, or decide any issues pertaining to any discretionary determination of whether the noncitizen should be permitted to pursue an asylum claim in the United States because such discretionary public interest determinations are reserved to DHS. The amendments further clarify that a noncitizen in removal proceedings who is otherwise ineligible to apply for asylum under the STCA, which includes the Additional Protocol of 2022, may apply for asylum if DHS files a written notice in the proceedings

before the immigration judge that it has decided in the public interest to allow the noncitizen to pursue claims for asylum or other related protection.

Next, DOJ is amending 8 CFR 1240.11(g)(4) by adding references to the Additional Protocol of 2022, where appropriate, to clarify the following provisions: first, a noncitizen who is found to be ineligible to apply for asylum under section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), is ineligible to apply for statutory withholding of removal and seek protection under the CAT; second, the noncitizen in this scenario may apply for any other relief from removal for which the noncitizen may be eligible; and third, if a noncitizen who is subject to the STCA, which includes the Additional Protocol of 2022, and section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), is ordered removed, the noncitizen shall be ordered removed to Canada, in which case the noncitizen will be able to pursue their protection claim under the laws of Canada.

Finally, DOJ is amending 8 CFR 1240.11(h)(1) to add a reference to the Additional Protocol of 2022. This amendment does not affect the substance of that paragraph.

The amendments to 8 CFR 1003.42(h)(1) and (2) and 8 CFR 1240.11(g) (heading), and paragraphs (g)(1), (g)(2)(i) and (ii), (g)(3) and (4), and (h)(1) are effective at 12:01 a.m. on Saturday, March 25, 2023.

This rule does not otherwise alter the procedures applied to noncitizens in section 240 removal proceedings as provided in current regulations.

V. Statutory and Regulatory Requirements

A. Administrative Procedure Act

The Administrative Procedure Act (“APA”) generally requires agencies to publish notice of a proposed rulemaking in the *Federal Register* and allow for a period of public comment. 5 U.S.C. 553(b). The APA also generally requires publication of a substantive rule not less than 30 days before its effective date. 5 U.S.C. 553(d). Agencies may forgo

notice-and-comment rulemaking and a delayed effective date when the rulemaking involves “a military or foreign affairs function of the United States.”⁵⁷

The Departments are bypassing notice-and-comment procedures and a delay in the effective date of the regulation because this rule involves a “foreign affairs function of the United States.”⁵⁸ The purpose of the foreign affairs exemption is to allow more cautious and sensitive consideration of those matters that affect relations with other Governments.⁵⁹ Courts have held that this exemption applies when the rule in question “is clearly and directly involved in a foreign affairs function.”⁶⁰ In addition, although the text of the APA does not expressly require an agency invoking this exemption to show that such procedures may result in “definitely undesirable international consequences,”

⁵⁷ See 5 U.S.C. 553(a)(1).

⁵⁸ In 2004, when implementing the STCA, DHS and DOJ promulgated regulations through notice-and-comment rulemaking even though the rulemaking related to United States foreign affairs and the Departments could have asserted that exemption to the notice-and-comment requirement. At the time, however, the STCA had only been recently negotiated, and the regulations created a new regulatory framework to address the special terms of the STCA. The Departments thus made a discretionary decision that public comment could be beneficial. The Departments’ 2004 decision does not obligate the Departments now to make the same decision with respect to this rulemaking. See, e.g., *Hector v. U.S. Dep’t of Agric.*, 82 F.3d 165, 171–72 (7th Cir. 1996) (observing that there is nothing in the APA to forbid an agency to use notice-and-comment procedures even if not required under the APA and that courts should attach no weight to an agency’s varied approaches involving similar rules); see also *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 744 n.62 (D. Or. 1997) (observing that agencies may voluntarily elect notice-and-comment procedures for a variety of reasons even though not required); cf. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101–02 (2015) (holding that agencies may “grant additional procedural rights in the exercise of their discretion,” including “the right to notice and an opportunity to comment” when not otherwise required by the APA, but also noting that “reviewing courts are generally not free to impose them if the agencies have not chosen to grant them” (quotation marks omitted)); *Malek-Marzban v. Immigr. & Naturalization Serv.*, 653 F.2d 113, 116 (4th Cir. 1981) (concluding that agencies are not estopped from asserting the foreign affairs exemption even if they routinely and voluntarily submitted policy decisions involving foreign affairs functions to rulemaking procedures in the past; the agencies’ past actions do not restrict agencies’ prerogatives when circumstances require swift action). Unlike in 2004, when the rulemaking created a completely new regulatory framework to implement the STCA, this rulemaking implements the terms of the Additional Protocol of 2022, which only expands the locations to which the STCA applies, while leaving in place the existing regulatory processes and procedures. Additionally, with this rulemaking, the Departments are implementing an existing international obligation and have determined that bypassing notice-and-comment procedures on the implementation of this foreign policy is warranted without seeking comments, for the reasons outlined in this rulemaking.

⁵⁹ See, e.g., *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 175, 200–03 (2d Cir. 2010) (holding that a DOS notice establishing an exemption from real property taxes on property owned by foreign governments was properly promulgated without notice and comment under the foreign affairs exemption of the APA); see also *Am. Ass’n of Exps. & Imps. Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985).

⁶⁰ *Mast Indus. v. Regan*, 596 F. Supp. 1567, 1582 (C.I.T. 1984) (cleaned up).

some courts have required such a showing.⁶¹ Under either formulation, a rule is covered by the foreign affairs exemption if, among other things, it directly involves activities or actions characteristic to the conduct of international relations.⁶² Cooperative agreements regulating migration and immigration with other nations, such as the STCA and the Additional Protocol of 2022, are similar to the executive agreements that have previously been recognized as part of the executive powers that bear the characteristics of the conduct of international relations.⁶³ The use of the foreign affairs exemption is well established and has long been recognized by courts as applicable when a rule itself—as is the case with this rulemaking—implements an international agreement between the United States and another sovereign state.⁶⁴

This rule falls under the foreign affairs exemption because it puts into effect the negotiated-and-signed Additional Protocol of 2022, which is supplementing the existing agreement between the Governments of the United States and Canada regarding migration issues and border management and, in particular, the management of the flow

⁶¹ See, e.g., *Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

⁶² See *City of New York*, 618 F.3d at 201 (finding that a DOS notice related directly to foreign affairs); see *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 53 (D.D.C. 2020) (“CAIR”) (observing that, for the foreign affairs exemption to apply, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations), *appeal dismissed as moot sub nom. I.A. v. Garland*, No. 20-5271, 2022 WL 696459 (D.C. Cir. Feb. 24, 2022).

⁶³ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (recognizing that the President has authority to enter into executive agreements with other countries, requiring no ratification by the Senate or approval by Congress, and that this power has “been exercised since the early years of the Republic”); see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (recognizing that immigration matters may involve foreign and military affairs for which the President has unique responsibility); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (“Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of [noncitizens] within our borders.”); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (finding that “[t]he authority to control immigration—to admit or exclude [noncitizens]—is vested solely in the Federal government”).

⁶⁴ See *Int'l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1486 (D.C. Cir. 1994) (upholding a regulation published under the foreign affairs exemption of the APA and implementing an agreement between the United States and Mexico); *WBEN, Inc. v. United States*, 396 F.2d 601, 616 (2d Cir.1968) (finding that the foreign affairs exemption applied to Federal Communications Commission rule implementing an agreement between the United States and Canada that imposed power limits on pre-sunrise broadcasts); *CAIR*, 471 F. Supp. 3d at 54 (observing that “the foreign affairs function exception plainly covers heartland cases in which a rule itself directly involves the conduct of foreign affairs,” such as “scenarios in which a rule implements an international agreement between the United States and another sovereign state”).

of asylum seekers. Furthermore, the Additional Protocol of 2022 implements United States foreign policy and fosters diplomatic relations with the Government of Canada by mutually supporting the integrity of each country's immigration system and aspects of the system specific to the U.S.-Canada border and regional migration management.⁶⁵

In cases other than those involving the implementation of international agreements, certain courts have found that immigration matters typically implicate foreign affairs, but that not all immigration matters meet the APA's foreign affairs exemption.⁶⁶ In those cases, courts have evaluated not only whether agency action implicates foreign affairs broadly, but also whether the use of notice-and-comment procedures and a 30-day delay in the effective date would "provoke definitely undesirable international consequences."⁶⁷ Here, a delay in implementation of the Additional Protocol of 2022 created by notice-and-comment rulemaking and a delayed effective date would lead to undesirable international consequences by jeopardizing not only the goals of the Additional Protocol of 2022, but also the United States diplomatic

⁶⁵ See STCA Introductory statements ("RECOGNIZING and respecting the obligations of each Party under its immigration laws and policies; EMPHASIZING that the United States and Canada offer generous systems of refugee protection, recalling both countries' traditions of assistances to refugees and displaced persons abroad, consistent with the principles of international solidarity that underpin the international refugee protection system, and committed to the notion that cooperation and burden-sharing with respect to refugee status claimants can be enhanced; . . . CONVINCED . . . that agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden-sharing . . .").

⁶⁶ See *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (stating that "[t]he foreign affairs exception would become distended if applied to [former Immigration and Naturalization Service] actions generally, even though immigration matters typically implicate foreign affairs").

⁶⁷ See *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 676 (9th Cir. 2021) (stating that, for the foreign affairs exemption to apply, the public rulemaking provisions should provoke definitely undesirable international consequences); see also *City of New York*, 618 F.3d at 202 ("In short, while a case-by-case determination that public rule making would provoke 'definitely undesirable international consequences,' may well be necessary before the foreign affairs exception is applied to areas of law like immigration that only indirectly implicate international relations, quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions are different. Such actions clearly and directly involve a foreign affairs function" (some quotation marks omitted)); *Rajah*, 544 F.3d at 437 (recognizing that multiple undesirable consequences could follow from notice-and-comment rulemaking, including impaired relations with other countries if the government were to conduct and resolve a public debate on matters affecting the other country).

relationship with Canada and the credibility of the United States as a negotiating partner on migration issues.

The Additional Protocol of 2022 and these implementing regulations further the United States foreign policy goal of collaborating with one of our closest allies, partners, and neighbors, as demonstrated by the joint public statements made by the Governments of Canada and the United States in the Roadmap for a Renewed U.S.-Canada Partnership⁶⁸ and the 2021 and 2023 NALS.⁶⁹ Implementing these regulations without delay supports international cooperation and reaffirms the United States commitment, as reflected in the Additional Protocol of 2022, to manage migration by deterring migration through irregular pathways and promoting the orderly handling of asylum seekers.⁷⁰ Because each government under the Additional Protocol of 2022 can expeditiously return an asylum applicant who crosses between POEs, just as occurs now at POEs under existing regulations, implementing the Additional Protocol of 2022 through these regulations furthers the shared United States and Canadian policy goal of reducing incentives for individuals to cross the shared border between POEs and to circumvent legal pathways, including existing legal channels for humanitarian protection. Through the Additional Protocol of 2022 and its implementation, both countries proactively and preventatively address situations that may lead to significant draws of asylum seekers between POEs to either the United States or Canada. Thus, the Additional Protocol of 2022 is an important element of both countries' ability to manage their shared border and maintain the integrity of their respective legal immigration and refugee and asylum protection policies.

⁶⁸ See White House, Roadmap.

⁶⁹ See White House, Building Back Better Together.; *see also* White House, Fact Sheet; White House, Los Angeles Declaration.

⁷⁰ The Departments also believe that promoting orderly handling of asylum claims may reduce the possibility for success in forum shopping.

In light of the expressed commitment and acknowledgement of shared responsibility by the United States Government to adopt an ambitious and comprehensive approach to safe, orderly, and humane migration management, as evidenced in joint public statements,⁷¹ it is critical that the United States Government act upon its commitment. Delaying the implementation of this rulemaking to pursue notice and comment could create doubt in Canada, and potentially other future partners, about whether the United States has sufficient flexibility and capacity to carry out agreements in accordance with its declared commitments.⁷² Therefore, this agreement should be implemented rapidly by amending the regulatory framework through this rule, in light of the President's renewed foreign policy commitment and the longstanding U.S.-Canada relationship.⁷³

In sum, the importance of promptly and faithfully implementing an international agreement requires publishing this final rule without notice and comment and without delaying the effective date of the rule. Any delay in implementing the Additional Protocol of 2022 caused by notice-and-comment procedures or by a delayed effective date could have a detrimental impact on meeting United States foreign policy objectives,

⁷¹ See White House, Building Back Better Together; *see also* White House, Roadmap; White House, Fact Sheet; White House, Los Angeles Declaration.

⁷² See *E. Bay Sanctuary Covenant*, 993 F.3d at 676 (explaining that the “[u]se of the exception is generally permissible where the international consequences of the rule-making requirements are obvious or thoroughly explained”); *Am. Ass’n of Exps. & Imps. Textile & Apparel Grp.*, 751 F.2d at 1249 (finding that the foreign affairs exemption facilitates “more cautious and sensitive consideration of those matters which ‘so affect relations with other Governments that . . . public rule-making provisions would provoke definitely undesirable international consequences’” (quoting H.R. Rep. No. 69-1980, at 23 (1946))).

⁷³ See *Rajah*, 544 F.3d at 437 (observing that the notice-and-comment process can be “slow and cumbersome,” which can negatively affect efforts to secure U.S. national interests, thereby justifying application of foreign affairs exemption); *Am. Ass’n of Exps. & Imps. Textile & Apparel Grp.*, 751 F.2d at 1249 (“The timing of an announcement of new consultations or quotas may be linked intimately with the Government’s overall political agenda concerning relations with another country. Were we to require that CITA provide notice thirty days before they take [e]ffect, the President’s power to conduct foreign policy would plainly be hampered.”).

on diplomatic relations with Canada, and on the credibility of the United States as a migration partner overall.⁷⁴

B. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Although this rule pertains to a foreign affairs function of the United States and therefore falls outside the scope of Executive Order 12866, the Departments voluntarily submitted the rule to the Office of Information and Regulatory Affairs of the Office of Management and Budget (“OMB”) for review, and OMB reviewed the rule on an expedited basis as though it were a significant regulatory action under section 3(f)(4) of that Executive Order.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, Public Law 96-354, 94 Stat. 1164 (1980), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, 110 Stat. 857, 864 (1996) (codified at 5 U.S.C. 601 *et seq.*), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is not subject to notice-and-comment rulemaking.

D. Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted for inflation), and it will not significantly or uniquely affect small

⁷⁴ As explained in this section, the United States and Canada negotiated the Additional Protocol of 2022 in the context of broader discussions to increase U.S.-Canadian cooperation on hemispheric migration, to enhance information sharing in support of each country’s immigration-related decision-making process, and to expand collaboration in the region to deter irregular migration at the source and in transit countries. Expedient implementation of the Additional Protocol of 2022 underscores the U.S.’s commitment to these imperatives and avoids possible undesirable international consequences.

governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48; *see also* 2 U.S.C. 1532(a).

E. Congressional Review Act

This final rule is not a major rule as defined by section 804 of the legislation commonly known as the Congressional Review Act (“CRA”), *see* Public Law 104–121, sec. 251, 110 Stat. 847, 868 (1996) (codified in relevant part at 5 U.S.C. 804). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. DHS and DOJ have complied with the CRA’s reporting requirements and have sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1). Because of this submission; because this rule is not a major rule; and because the foreign affairs exemption in the APA applies to this rule, this rule does not have a delayed effective date. *See* 5 U.S.C. 801(a)(4).

F. Executive Order 13132 (Federalism)

This final rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This final rule was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. This rule was written to provide a clear legal standard for

affected conduct and was reviewed carefully to eliminate drafting errors and ambiguities so as to minimize litigation and undue burden on the Federal court system. The Departments have determined that this proposed rule meets the applicable standards provided in section 3 of Executive Order 12988.

H. Family Assessment

The Departments have reviewed this rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,⁷⁵ enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.⁷⁶ The Departments have systematically reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action: (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) has a sufficient justification for any financial impact on families; (6) may be carried out by State or local government or by the family; or (7) establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If an agency determines a regulation may negatively affect family wellbeing, then the agency must provide an adequate rationale for its implementation.

The Additional Protocol of 2022 expands the applicability of the STCA, but otherwise leaves in place all existing policies, procedures, and safeguards provided by the current regulations implementing the STCA. The Departments have therefore determined that the implementation of this rule will not negatively affect family

⁷⁵ See 5 U.S.C. 601 note.

⁷⁶ Public Law 105-277, 112 Stat. 2681, 2681-528 (1998).

wellbeing and will not have any impact on the autonomy or integrity of the family as an institution.

I. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

J. National Environmental Policy Act

DHS and its components analyze actions to determine whether the National Environmental Policy Act, Public Law 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. 4321 *et seq.*) (“NEPA”), applies to them and, if so, what degree of analysis and documentation is required. DHS Directive 023-01 Rev. 01⁷⁷ and Instruction Manual 023-01-001-01 Rev. 01 (“Instruction Manual”)⁷⁸ establish the policies and procedures that DHS and its components use to comply with the NEPA and the Council on Environmental Quality (“CEQ”) regulations for implementing the procedural requirements of NEPA. The CEQ regulations allow Federal agencies to establish, in their NEPA implementing procedures, with CEQ review and concurrence, categories of actions (“categorical exclusions”) that experience has shown normally do not, individually and cumulatively, have a significant effect on the human environment and,

⁷⁷ DHS, Implementation of the National Environmental Policy Act, Directive 023-01 (Oct. 31, 2014), https://www.dhs.gov/sites/default/files/publications/DHS_Directive%20023-01%20Rev%2001_508compliantversion.pdf.

⁷⁸ DHS, Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (NEPA) (Nov. 6, 2014), https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf.

therefore, do not require preparation of an environmental assessment or environmental impact statement.⁷⁹ Appendix A of the Instruction Manual lists the DHS categorical exclusions.

Under DHS NEPA implementing procedures, for an action to be categorically excluded it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.⁸⁰

This final rule amends existing DHS and DOJ regulations at 8 CFR 208.30(e)(6) and (7), 8 CFR 1003.42(h)(11) and (2), and 8 CFR 1240.11(g) by incorporating modifications recently negotiated by the Government of the United States and the Government of Canada to specific terms of the STCA in the Additional Protocol of 2022. The STCA permits the respective governments to manage which government decides certain noncitizens' requests for protection from persecution or torture; correspondingly, under section 208(a)(2)(A) of the INA, 8 U.S.C. 1182(a)(2)(A), and section 240 of the INA, 8 U.S.C. 1229a, the Departments apply the threshold screening requirement outlined in 8 CFR 208.30(e)(6), 8 CFR 1003.42(h) and 8 CFR 1240.11(g)(1) through (4) and pursuant to domestic implementation of this international treaty obligation to determine whether they should adjudicate a noncitizen's claim for asylum or other protection claim relating to persecution or torture. The STCA, as originally negotiated, did not include those noncitizens seeking entry into the United States between the official POEs (to include certain bodies of waters as mutually designated by the United States and Canada) and who make an asylum or other protection claim within 14

⁷⁹ See 40 CFR 1501.4, 1507.3(e)(2)(ii), 1508.1(d).

⁸⁰ See Instruction Manual sec. V.B(2)(a)–(c).

days after such crossing. Upon implementation of the Additional Protocol of 2022 in each respective country, and upon the effective date of this rule at 12:01 a.m. on Saturday, March 25, 2023, the threshold screening requirement will also apply to noncitizens who cross the U.S.-Canada land border between the official POEs and make an asylum or other protection claim relating to persecution or torture within 14 days after such crossing.

The Departments are not aware of any significant impact on the environment, or any change in environmental effect that will result from the amendments being promulgated in this Final Rule. Furthermore, the Departments have determined that this rule clearly fits within categorical exclusion A3 in the Instruction Manual. The rule is applied prospectively.

This final rule addresses specific threshold screening requirements as negotiated in the Additional Protocol of 2022 and is not part of a larger action. In accordance with its NEPA implementing procedures, the Departments find no extraordinary circumstances associated with this final rule that may give rise to significant environmental effects requiring further analysis and documentation. Therefore, this action is categorically excluded, and no further NEPA analysis or documentation is required.

K. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104-13, 109 Stat. 163 (codified at 44 U.S.C. chapter 35), and its implementing regulations, 5 CFR part 1320.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1003

Administrative practice and procedure, Authority delegations (Government agencies), Fees, Reporting and recordkeeping requirements.

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in this preamble, DHS amends part 208 of chapter I of the title 8 of the Code of Federal Regulations as follows:

PART 208 — PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for 8 CFR part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; 8 CFR part 2; Pub. L. 115-218.

2. Amend § 208.30 by revising paragraphs (e)(6) introductory text, (e)(6)(i) through (iii), and (e)(7) to read as follows:

§ 208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.

* * * * *

(e) * * *

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the United States during removal by Canada or an alien who, on or after 12:01 a.m. on Saturday, March 25, 2023, entered the United States by crossing the U.S.-Canada land border between the ports-of-entry, including a crossing of the border in those waters as mutually

designated by the United States and Canada, and who made an asylum or other protection claim relating to fear of persecution or torture within 14 days after such crossing, has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (“Agreement”), which includes the Additional Protocol of 2022 to the Agreement Between the Government of the United States of America and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (“Additional Protocol of 2022”). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph (e)(6). The asylum officer shall advise the alien of the exceptions contained in the Agreement, which includes the Additional Protocol of 2022, and question the alien as to applicability of any of these exceptions to the alien’s case.

(i) If the asylum officer, with concurrence from a supervisory asylum officer, determines that an alien is subject to the Agreement, which includes the Additional Protocol of 2022, and that an alien does not qualify for an exception under the Agreement, which includes the Additional Protocol of 2022, during this threshold screening interview, the alien is ineligible to apply for asylum in the United States. After the asylum officer’s documented finding is reviewed by a supervisory asylum officer, the alien shall be advised that the alien will be removed to Canada in order to pursue the alien’s claims relating to a fear of persecution or torture under Canadian law. Aliens found ineligible to apply for asylum under this paragraph shall be removed to Canada.

(ii) If the alien establishes by a preponderance of the evidence that the alien qualifies for an exception under the terms of the Agreement, which includes the Additional Protocol of 2022, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution or torture under paragraph (d) of this section.

(iii) An alien qualifies for an exception to the Agreement, which includes the Additional Protocol of 2022, if the alien is not being removed from Canada in transit through the United States and:

(A) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

(B) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States, provided, however, that this exception shall not apply to an alien whose relative maintains only nonimmigrant visitor status, as defined in section 101(a)(15)(B) of the Act, or whose relative maintains only visitor status based on admission to the United States pursuant to the Visa Waiver Program;

(C) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending before U.S. Citizenship and Immigration Services, the Executive Office for Immigration Review, or on appeal in federal court in the United States;

(D) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

(E) Arrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States to the alien, or,

being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

(F) The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

* * * * *

(7) When an immigration officer has made an initial determination that an alien, other than an alien described in paragraph (e)(6) of this section and regardless of whether the alien is arriving at a port of entry, appears to be subject to the terms of an agreement authorized by section 208(a)(2)(A) of the Act, and seeks the alien's removal consistent with that provision, prior to any determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether the alien is ineligible to apply for asylum in the United States and is subject to removal to a country ("receiving country") that is a signatory to the applicable agreement authorized by section 208(a)(2)(A) of the Act, other than the U.S.-Canada Agreement, which includes the Additional Protocol of 2022. In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, except that paragraphs (d)(2) and (4) of this section shall not apply to aliens described in this paragraph (e)(7). The asylum officer shall advise the alien of the applicable agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case. The alien shall be provided written notice that if the alien fears removal to the prospective receiving country because of the likelihood of persecution on account of a protected ground or torture in that country and wants the officer to determine whether it is more likely than not that the alien

would be persecuted on account of a protected ground or tortured in that country, the alien should affirmatively state to the officer such a fear of removal. If the alien affirmatively states such a fear, the asylum officer will determine whether the individual has demonstrated that it is more likely than not that the alien would be persecuted on account of a protected ground or tortured in that country.

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DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in this preamble, the Attorney General amends parts 1003 and 1240 of chapter V of title 8 of the Code of Federal Regulations as follows:

PART 1003 – EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

3. The authority citation for 8 CFR part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1003, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p.1002; section 203 Pub. L. 105-100, 111 Stat 2196-200; sections 1506 and 1510 of Pub. L. 106-308, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

4. Amend § 1003.42 by revising paragraphs (h)(1) and (2) to read as follows:

§ 1003.42 Review of credible fear determinations.

* * * * *

(h) *Safe Third Country Agreement*—(1) *Applicants for admission, 2002 U.S.-Canada Agreement, which includes the Additional Protocol of 2022.* An immigration judge has no jurisdiction to review a determination by an asylum officer that an applicant for admission is not eligible to apply for asylum pursuant to the 2002 U.S.–Canada Agreement, which includes the Additional Protocol of 2022, formed under section

208(a)(2)(A) of the Act and should be returned to Canada to pursue their claims for asylum or other protection under the laws of Canada. See 8 CFR 208.30(e)(6).

However, in any case where an asylum officer has found that an applicant for admission qualifies for an exception to that Agreement, which includes the Additional Protocol of 2022, or that the Agreement, which includes the Additional Protocol of 2022, does not apply, an immigration judge does have jurisdiction to review a negative credible fear finding made thereafter by the asylum officer as provided in this section.

(2) *Aliens in transit.* An immigration judge has no jurisdiction to review any determination by DHS that an alien being removed from Canada in transit through the United States should be returned to Canada to pursue asylum claims under Canadian law, under the terms of the 2002 U.S.-Canada Agreement, which includes the Additional Protocol of 2022.

* * * * *

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

5. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105-100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277 (112 Stat. 2681).

6. Amend § 1240.11 by revising paragraphs (g) and (h)(1) to read as follows:

§ 1240.11 Ancillary matters, applications.

* * * * *

(g) *U.S.-Canada safe third country agreement, which includes the Additional Protocol of 2022.* (1) The immigration judge has authority to apply section 208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to Canada pursuant to the 2002 U.S.-Canada Agreement (“Agreement”), in the case of an alien who is subject

to the terms of the Agreement, which includes the Additional Protocol of 2022, and is placed in proceedings pursuant to section 240 of the Act. In an appropriate case, the immigration judge shall determine whether under that Agreement, which includes the Additional Protocol of 2022, the alien should be returned to Canada, or whether the alien should be permitted to pursue asylum or other protection in the United States.

(2) An alien described in paragraph (g)(1) of this section is ineligible to apply for asylum, pursuant to section 208(a)(2)(A) of the Act, unless the immigration judge determines, by preponderance of the evidence, that:

(i) The Agreement, which includes the Additional Protocol of 2022, does not apply to the alien or does not preclude the alien from applying for asylum in the United States; or

(ii) The alien qualifies for an exception to the Agreement, which includes the Additional Protocol of 2022, as set forth in paragraph (g)(3) of this section.

(3) The immigration judge shall apply the applicable regulations in deciding whether the alien qualifies for any exception under the Agreement, which includes the Additional Protocol of 2022, that would permit the United States to exercise authority over the alien's asylum claim. The exceptions under the Agreement, which includes the Additional Protocol of 2022, are codified at 8 CFR 208.30(e)(6)(iii). The immigration judge shall not review, consider, or decide any issues pertaining to any discretionary determination on whether the alien should be permitted to pursue an asylum claim in the United States notwithstanding the general terms of the Agreement, which includes the Additional Protocol of 2022, as such discretionary public interest determinations are reserved to DHS. However, an alien in removal proceedings who is otherwise ineligible to apply for asylum under the Agreement, which includes the Additional Protocol of 2022, may apply for asylum if DHS files a written notice in the proceedings before the

immigration judge that it has decided in the public interest to allow the alien to pursue claims for asylum or withholding of removal.

(4) An alien who is found to be ineligible to apply for asylum under section 208(a)(2)(A) of the Act is ineligible to apply for withholding of removal pursuant to section 241(b)(3) of the Act and the Convention Against Torture. However, the alien may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to the Agreement, which includes the Additional Protocol of 2022, and section 208(a)(2)(A) of the Act is ordered removed, the alien shall be ordered removed to Canada, in which the alien will be able to pursue his or her claims for asylum or protection against persecution or torture under the laws of Canada

(h) * * *.

(1) The immigration judge has authority to apply section 208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to a third country pursuant to a bilateral or multilateral agreement—other than the 2002 U.S.-Canada Agreement, which includes the Additional Protocol of 2022—in the case of an alien who is subject to the terms of the relevant agreement and is placed in proceedings pursuant to section 240 of the Act. In an appropriate case, the immigration judge shall determine whether under the relevant agreement the alien should be removed to the third country, or whether the alien should be permitted to pursue asylum or other protection claims in the United States. If more than one agreement applies to the alien and the alien is ordered removed, the immigration judge shall enter alternate orders of removal to each relevant country.

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Alejandro N. Mayorkas,
Secretary,
U.S. Department of Homeland
Security,

Dated: March 22, 2023

Merrick B. Garland
Attorney General
U.S. Department of Justice

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